Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: July 18, 1997

CASE NO: 95 INA 268

In the Matter of:

NANCY WILLS-KING,
Employer,

On Behalf of:

LUCYNA BUKOWSKA,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Lucyna Bukowska (Alien) by Nancy Wills-King(Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and avail-

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

able at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On March 16, 1994, the Employer applied for labor certification to permit her to employ the Alien on a permanent basis as a "Family Dinner Service Specialist" to perform the following duties in her household:

> Plans menus and cooks meals according to recipes. Cooks vegetables and bakes breads and pastries. Boils, broils, fires, and reasons meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals. Performs seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. Accounts for the expenses incurred in purchasing foodstuff.

The position was classified as "Cook, Household-Liveout" under DOT Code No. 305.281-010.[2] The application (ETA 750A) indicated the minimum education requirement of elementary and high school graduation, but specified that applicants must have two years of experience in the Job Offered. The basic workweek is forty hours from 10:00 AM to 7:00 PM, at $12.48 per hour, with no indication that any overtime work was to be required. As the Alien worked from September 1991 to February 19, 1994, as a Family Dinner Service Specialist at a residence in New York, N.Y., and completed high school in Poland, she meets the qualifications stated by the Employer's application.

Notice of Findings. On July 15, 1994, a Notice of Findings (NOF) was issued to advise that certification would be denied

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[2]DOT No. **305.281-010 Cook (Domestic ser.)**Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

unless the Employer corrected the defects that the CO noted. The CO said the Employer's application failed to establish that the position at issue was permanent fulltime work within the meaning of 20 CFR § 656.3.

The CO specified the evidence needed for the Employer to prove that the job offered is a full time position in order to give Employer an opportunity to answer with facts that the position is, in fact, a permanent, fulltime job that consisted of a forty hour week spent in performing the cooking and related food preparation duties, explaining that, "It does not appear feasible that these duties constitute fulltime employment in the context of your household." Rebuttal, said the CO, required evidence of business necessity, rather than Employer preference or convenience, and that the position is customary to the Employer. To establish business necessity under 20 CFR § 656.21(b)(2)(i), said the CO, the Employer must demonstrate that her job requirements bear a reasonable relationship to the occupation in the context of Employer's business. The CO directed the Employer to prove business necessity by providing the evidence specified in detail at AF 28-29.

Rebuttal. On August 10, 1994, the Employer filed a rebuttal in which Ms. Wills-King described her family's need for the services of a cook, indicating the approximate number of hours during which such work would be performed. The Employer is a designer and her husband is an architect. They work from 10:00 AM to 6:00 PM in their own businesses, and had a child who is at nursery school from 10:00 AM until 12:00 PM. The Alien would be required to prepare and serve three meals a day and about fifteen meals a week for the Employer, her husband, and their child. The cooking duties comprise six hours of the day, while the related duties indicated would take two hours, said the Employer. At the time of the application, the Employer's mother-in-law was doing the cooking and was caring for their child, but would discontinue this. Employer claimed no history of employing a cook, and said she and her husband jointly perform the general cleaning and maintenance of the household.

Final Determination. On September 1, 1994, the CO denied certification on grounds that the Employer failed to prove that the position was fulltime employment under the Act. After reviewing the specific documentation required in the NOF, the CO concluded that the Employer's rebuttal failed to address the NOF satisfactorily. After noting the omission of several forms of evidentiary proof that the Employer neglected to furnish in the rebuttal, the CO concluded, inter alia, that the Employer's statement that she had never employed a cook in the household did "not satisfactorily rebut this issue." Explaining that the Employer had failed to provide evidence that employment of a fulltime cook was a customary requirement for her household, the CO denied certifications after concluding that, "Employer has not

established that she has customarily employed fulltime cooks in the past." AF 35-36. The CO took note of the NOF requirement that the Employer establish that the job offer meets the definition of "employment" by presenting evidence that the position constitutes fulltime employment. The CO then said that the NOF requires the Employer further to prove that the job offer meets the definition of "employment" by evidence that Employer's requirement for the position "arises from a business necessity rather than employer preference or convenience and is customary to the employer." AF 36. The CO later concluded that

> Employer has not provided evidence that employment of a full time cook is a customary requirement for [her] household. It appears that employment of a full time cook is not a customary requirement this household.
>
> Employer has not established that she has customarily employed full time cooks in the past. Based on the discussion contained herein, the application is denied.

Employer's appeal. In seeking review of the denial of certification the Employer restated the evidence and arguments of her rebuttal, citing **Crystal Shamrock, Inc.**, 81-INA-180)(1981), for the criterion under which the evidence is to be weighed, and the Employer then requested that the decision in the FD of the CO be reversed. AF 42-43.

DISCUSSION

The only issue Employer raised in her appeal is whether the CO lawfully required the Employer to establish the "business necessity" for the position requiring certification of the Alien under the Act and regulations. In the Final Determination the CO appears to have weighed and decided the issue of certification in terms of 20 CFR § 656.21(b)(2)(i).[3] Examined in the context of this subsection, however, the Employer's position description is not at issue, as the work to be performed in this job under the Employer's application is set forth in language that closely approximates the text of the job, as classified in the DOT.

It follows for this reason that the CO's repeated references to "business necessity" in the NOF do not allude to one or more

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[3] **20 CFR § 656.21(b)(2)(i)** addresses the business necessity of a job requirement in the following language: (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements: (i) The job opportunity's requirement, unless adequately documented as arising from business necessity: (A) Shall be those normally required for the job in the United States; (B) Shall be those defined for the job in the Dictionary of Occupational Titles(D.O.T.) including those for subclasses of jobs; ...

unduly restrictive job requirements. The only other possibility is that 20 CFR § 656.21(b)(2)(i) was applied by the CO by way of analogy in the course of deciding whether or not the Employer has established the existence of a fulltime permanent position for which she seeks certification for this Alien.[4]

In this case the NOF did not address this as a deficiency, but focused the Employer's rebuttal on the "business necessity" of the job, even though the regulations do not require the Employer to establish the "business necessity" of the position under 20 CFR § 656.21(b)(2)(i), if the Employer has shown that a genuine need for the services to be performed by the worker in this position does exist. **Paris Bakery Corp.**, 88 INA 337(Jan. 4, 1990)(en banc). Compare **Young Seal of America** 88 INA 121(May 17, 1989)(en banc), citing **Amger Corp.**, 87 INA 545 (Oct. 15, 1987).[5] The Employer's need for the services was not challenged in the NOF beyond the requirement for proof of "business necessity," however. Consequently, the CO's pointed reliance on 20 CFR § 656.21(b)(2)(i) and repeated references to "business necessity" in the context of this application was inappropriate to the weighing of the record and to the CO's determination of the Alien's entitlement to certification. It follows for these reasons that the CO's findings as to whether or not this is a fulltime position are problematical, since the CO's overwhelming emphasis on 20 CFR § 656.21(b)(2)(i) in the FD raised a question as to whether or not the CO relied on an incorrect interpretation of the Act and regulations in denying certification in this case.

It is clear that no other objection to certification was raised in the NOF and that the CO's only reason for the denial of certification in this case is the Employer's failure to establish the "business necessity" of this position, as discussed above. It follows that the Employer has met the criteria of the Act and regulations and that certification should be granted.

Accordingly, the following order will enter.

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[4]As to the Employer's burden of proving that the position is full time see **Milany Productions Corp.**, 94-INA-454(Jan.10, 1996); **Production Tool Corp.,** 93-INA-187(Feb. 21, 1995).

[5]Also see **Abedlghani and Houda Abadi**, 90-INA-139 (June 4, 1991); **Hubert Peabody,** 90-INA-230 (Apr 30, 1991); **Joon Sup Park,** 89-INA-231 (Mar. 25, 1991); **Shinn Shyng Chang,** 88-INA-028 (Sept. 21, 1989); **Timmy Wu,** 87-INA-735 (June 28, 1988).

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is hereby Reversed and the Employer's application for alien labor certification is hereby Granted.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

NANCY WILLS-KING, Employer,
LUCYNA BUKOWSKA, Alien

CASE NO : 95-INA-268

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: May 6, 1997